No. 82-1711

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Colorado

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF PETITIONER
and
BRIEF OF AMICUS CURIAE ON BEHALF OF THE PETITIONER

Appellate Committee of the
California District
Attorneys Association

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BEHALF OF PETITIONER

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Appellate Committee of the California District Attorneys Association and Robert H. Philibosian the District Attorney of Los Angeles County, a political subdivision of the State of

California within the meaning of Rule 36(4) respectfully move for leave of this Court to file the attached Amicus Curiae brief in support of Petitioner. Three copies of the brief, together with this request, have been served upon each counsel in the instant case as well as the Denver District Court and the Supreme Court of Colorado. Again, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Amicus Curiae brief attached hereto is being conditionally filed with this motion for leave to file this brief.[1]

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[1] Amicus is also seeking leave to file an amicus brief on behalf of the Petitioner in the case of Commonwealth of Massachusetts v. Sheppard, No. 82-963, which addresses the good faith exception to the exclusionary rule under circumstances of issuance and execution of a search warrant. Although this Court has

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorneys' offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact on the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the

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accepted for hearing a third case, United States v. Leon, 82-1771, Amicus has not filed a motion for leave to file an Amicus brief nor amicus brief therein since the Amicus believes that the search and seizure made incident to the execution of a search warrant in United States v. Leon, supra, is independently lawful under authority of Illinois v. Gates (1983) ___ U.S. ___, 103 S.Ct. 2317.

outcome of this case will have substantial impact upon the administration of criminal justice throughout California. Accordingly, the Committee has decided to move for leave of this court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California (see Supreme Court Rule 36(4)).

The central day-to-day function of the offices whose members constitute the California District Attorneys Association is to aid in the successful discovery,

apprehension, and prosecution of those who commit crimes. Therefore the Association and its membership have a vital interest in urging this Court to adopt the good faith exception to the exclusionary rule as set forth herein. It is felt by Amicus that such a rule is a reasonable modification of the present rule excluding previously seized relevant evidence.

Amicus curiae has researched and analyzed the development of the exclusionary rule. Amicus has studied the opinion of the Colorado Supreme Court. Amicus is intimately familiar with the impact of the exclusionary rule on prosecution of crime in California. It is felt that Amicus' analysis of the issues, with specific reference

to the experience in California, will be of assistance to this Court in its resolution of the issues of law presented by this case. A brief summary of argument in support of the adoption of the good faith exception to the exclusionary rule follows this Motion for Leave and, insofar as it further elucidates why the brief of amicus is desirable, is incorporated herein.

For all of the above stated reasons, it is urged that this Court

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grant this motion for leave to file the Amicus Curiae brief which is attached hereto.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorneys Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for Amicus Curiae

SUMMARY OF ARGUMENT

This brief urges that a good faith exception to the exclusionary rule be adopted. Specifically, it is submitted that when a police officer acts without warrant or other judicial mandate and seizes evidence, that evidence should not be suppressed where the police officer's conduct is both subjectively reasonable (that police officer in fact believed he/she acted lawfully) and objectively reasonable (a police officer would reasonably believe that he/she acted lawfully).

Unfettered application of the exclusionary rule, which suppresses admittedly relevant evidence, has a deleterious effect upon successful prosecution of crime. A California study of cases rejected

for search and seizure consideration reflects that almost half of those individuals whose cases were rejected were rearrested within two years. That same California experience disclosed that almost one third of all felony drug arrests sampled were rejected at the time these cases were presented for filing to the prosecutor due to problems with search and seizure.

California voters have recognized the adverse impact upon public safety of excluding relevant and truthful evidence. The voters of this State have adopted an amendment to their constitution which limits exclusion of relevant evidence to the requirements of the federal constitution.

The objectives of the

exclusionary rule, deterrence of future police conduct and assurance of "judicial integrity", are not furthered in instances when police conduct is both subjectively and objectively reasonable. It is urged that this Court adopt the good faith exception to the exclusionary rule.

ARGUMENT

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED

The evolution of the exclusionary rule reflects the development of a concept which is by no means monolithic or without controversy (see generally Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027) (1974); Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. &

Criminology 635 (1978); Gifford, Constitutional Law: Search and Seizure - The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine - Michigan v. DeFillippo (1979) 443 U.S. 31, 55 Wash. L. Rev. 849 (1980); Bringegar, Limiting the Application of the Exclusionary Rule - The Good Faith Exception, 34 Vand. L. Rev. 213 (1981); Leonard, The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice, 4 Whittier L.R. 33 (1981)). Initially conceived as relating both to the Fourth and Fifth Amendment (Boyd v. United States (1886) 116 U.S. 616, 632, 634-635, 6 S.Ct. 524, 29 L.Ed. 746), the exclusionary rule had been applied to the states under precepts of due process in Rochin v.

California (1952) 342 U.S. 165, 186, 96 L.Ed. 183, 72 S.Ct. 205, until in Mapp v. Ohio (1961) 367 U.S. 643, 655, 6 L.Ed.2d 1081, 1090, 81 S.Ct. 1684 a plurality opinion of this Court stated "that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court". However, only four justices subscribed to the view that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in state criminal trials.[2] Moreover,

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2 Only four of the five Supreme Court Justices who comprised the majority in Mapp v. Ohio, supra, 367 U.S. 643, were of the opinion that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in state criminal trials. The majority opinion was authored by Justice Clark (id. at 643). The concurring opinion was by Justice

subsequent to Mapp v. Ohio, supra, this Court has reiterated that the exclusionary rule is judicially created and is not constitutionally

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Douglas (id. at 666). Justice Black stated in a concurring opinion that the Fourth Amendment, standing alone, did not bar from evidence items seized in violation of its commands. Only when the Fourth Amendment's ban against unreasonable searches and seizures is considered in conjunction with the Fifth Amendment's ban against self-incrimination did a constitutional basis emerge which required the exclusionary rule (id. at 661-662; see Justice Harlan's dissenting opinion (id. at 672)). Justice Stewart expressed no view on the merits of the constitutional issue before the Court. He would have reversed on the ground that the Ohio statute under which the defendant was convicted violated constitutional guarantees of free thought and expression (id. at 682). Note that Justice Powell, writing for the six member majority in Stone v. Powell (1976) 428 U.S. 465, 49 L.Ed.2d 1046, 96 S.Ct. 3021), stated with respect to Mapp: "Only four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconstitutionally seized evidence in state criminal trials." (Id. 428 U.S. 465, 484 n. 21).

mandated (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 571, 94 S.Ct. 613; United States v. Peltier (1975) 422 U.S. 531, 538, 45 L.Ed.2d 374, 95 S.Ct. 2313; United States v. Janis (1976) 428 U.S. 433, 459-460, 49 L.Ed.2d 1046, 96 S.Ct. 3021; Stone v. Powell (1976) 428 U.S. 465, 482, 49 L.Ed.2d 1067, 96 S.Ct. 3037). The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim (United States v. Calandra, supra, 414 U.S. at 347). Rather the rule's prime purpose has been to deter future unlawful police conduct (United States v. Calandra, supra, 414 U.S. at 347; United States v. Peltier, supra, 422 U.S. at 536; United States v. Janis, supra, 428 U.S. 446), although empirical studies

have never confirmed that the rule is effective in this respect (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485; Illinois v. Gates, supra, ___ U.S. ___ 103 S.Ct. 2317, Justice White concurring).[3] A subordinate purpose of the exclusionary rule, assurance of "judicial integrity" by not admitting illegally seized evidence in certain

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3 The most comprehensive study on the effectiveness of the deterrence purpose of the exclusionary rule is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970), which is discussed together with other studies in footnote 22 of the opinion in United States v. Janis, supra. After discussing the various studies this Court in Janis states: "The final conclusion is clear. No empirical research, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." (Id. at 452).

criminal proceedings (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485), "does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment" (United States v. Janis, supra, 428 U.S. at 458, note 35). There is the recognition that the suppression of probative but tainted evidence exacts a costly toll upon the search for the truth in criminal proceedings (United States v. Payner (1980) 447 U.S. 727, 734, 65 L.Ed.2d 468, 476, 100 S.Ct. 2439; Illinois v. Gates, supra, ___ U.S. ___ 103 S.Ct. 2317, Justice White concurring). Thus, the rule is not applied where the defendant is not the direct recipient of the unlawful search (Rakas v. Illinois (1978) 439 U.S.

128, 58 L.Ed.2d 387, 99 S.Ct. 421). The exclusionary rule has not been extended to grand jury proceedings (United States v. Calandra, supra, 414 U.S. 338). It has been rejected in civil proceedings respecting the return of unconstitutionally seized property (United States v. Janis, supra, 428 U.S. 433). The rule has been restricted in the area of relitigation of habeas corpus claims in federal courts (Stone v. Powell, supra, 428 U.S. 465). The application of the exclusionary rule is not required where law enforcement acts in good faith reliance upon a statute or ordinance which is subsequently held to be unconstitutional (United States v. Peltier (1975) 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313; Michigan

v. DeFillippo (1979) 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627).

It has been repeatedly recognized by this Court that unbending application of the exclusionary rule undermines the truth finding function of our criminal justice system (e.g. Rakas v. Illinois (1978) 439 U.S. at 137-138, 58 L.Ed.2d 387, 99 S.Ct. 421; United States v. Ceccolini (1978) 435 U.S. 268, 275-279, 55 L.Ed.2d 268, 92 S.Ct. 1054; Stone v. Powell (1976) 428 U.S. 465, 489-491, 49 L.Ed.2d 1067, 96 S.Ct. 3037; Michigan v. Tucker (1974) 417 U.S. 433, 450-451, 41 L.Ed.2d 182, 94 S.Ct. 2357); United States v. Calandra, supra, 414 U.S. at 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at

734, 65 L.Ed.2d at 476, 100 S.Ct. 2439).

A report by the National Institute of Justice of the United States Department of Justice (Criminal Justice Research Report, The Effect of the Exclusionary Rule, Study in California, December, 1982) illustrates the extent to which the exclusionary rule exacts a severe price upon a society which seeks to protect itself from crime. That Criminal Justice Research report reveals that almost half the individuals in California whose cases were rejected for search and seizure problems were rearrested within two years. An analysis of the nature of the felony rearrests disclosed that although many rearrests were for drug crimes, the majority of the rearrests

were for personal property crimes or other felony arrests (id. at 18). The report reflects that in the area of felony drug arrests, 32.5% of all felony drug arrests referred for prosecution to the Pomona Branch Office of the Los Angeles County District Attorney's Office in 1981 were rejected at the time these cases were presented to the prosecutor for filing due to problems with search and seizure. A sample of drug cases submitted to the Central Office of the Los Angeles District Attorney disclosed a 29% rejection rate due to search and seizure problems (id. at pages 2, 13). Moreover, the report concluded that the data analyzed in the study tended to understate the net effect of the exclusionary rule (id. at page 9). In light of the

toll the rule exacts from society, it is unjustifiable to exclude evidence obtained in good faith when the police officer has acted in both a subjective and objective reasonable manner.

The exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served." (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at 734, 65 L.Ed.2d at 476, 100 S.Ct 2439). These objectives are not furthered in instances, such as the case at bar, where police conduct is subjectively and objectively reasonable.

Where an arrest, search, and/or seizure is made without

benefit of warrant it is urged that a police officer's conduct must not only be undertaken in good faith (i.e. subjectively reasonable) but must also be objectively reasonable. This standard has been explained by the Fifth Circuit in United States v. Williams (5th Circuit 1980) 622 F.2d 830, 841, note 4a: "We emphasize that the belief [of the police officer], in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulate premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully". By requiring a subjective and objective reasonable good faith belief that the evidence may properly

be seized, restraint is placed upon unjustified police conduct. Meanwhile, the standard to be employed does not unreasonably punish society when the police officer does not act with the legal knowledge of a criminal law specialist of the bench or bar.

If a police officer engages in a search or seizure in the belief that his conduct is lawful and if, based upon the facts known to the officer and his expertise, if any, a reasonable person would conclude that the police officer acted lawfully, how can it be said that the officer's conduct violates the prohibition in the Fourth Amendment against unreasonable searches and seizures and, as a consequence thereof, how can the exclusion of evidence be

required? Certainly the purposes of the exclusionary rule would not be "efficaciously served" (United States v. Calandra, supra, 414 U.S. at 348) since there would appear to be no need to deter an officer from engaging in conduct which is both subjectively and objectively reasonable. Nor would "judicial integrity" (United States v. Janis, supra, 428 U.S. at 458) be compromised by such conduct.

CONCLUSION

In 1982 the voters of the State of California in a statewide primary election, adopted an initiative, Proposition 8, which modified the California Constitution so as to conform California rules respecting the admissibility of seized evidence to the federal

constitutional model (Proposition 8, California Constitution, Article I, Section 28, subdivision (d)).[4] The

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[4] California Constitution, Article I, Section 28, subdivision (d) states:

> "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

It was recognized that "[t]he measure [California Constitution, Article I, Section 28, subdivision (d)] could not affect federal regulations on the use of evidence" (California Ballot Pamphlet, Primary Election June 8, 1982, emphasis in original, Analysis by the Legislative Analyst, p. 32.)

People of this State recognized, in enacting that initiative, that society must be more effectively protected from crime (Proposition 8, California Constitution, Article I, Section 28, subdivision (a)).[5]

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[5] California Constitution Article I, Section 28, subdivision (a) is a preamble to Proposition 8 which states:

> "The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern. The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and

Californians now look to this Court for the standard to be applied in respect to admission of previously

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encouraged as a goal of highest importance.

Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

seized evidence. This Court should adopt the good faith exception to the exclusionary rule.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorney's Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for the Appellate Committee of the California District Attorneys Association

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of Roderick W. Leonard, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 9014-3296; that the District Attorney of Los Angeles County is the amicus curiae on behalf

of the Petitioner in the above-entitled matter. On September 6, 1983, I served three copies of the foregoing on the following persons and courts by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

NORMAN S. EARLY, JR.
DISTRICT ATTORNEY
SECOND JUDICIAL DISTRICT
STATE OF COLORADO
924 WEST COLFAX
DENVER CO 80204

THOMAS M. VAN CLEAVE, III, ESQ.
1575 SHERMAN STREET
DENVER CO 80203

SUPREME COURT OF COLORADO
2 EAST 14TH AVENUE
FOURTH FLOOR
DENVER CO 80208

DENVER DISTRICT COURT
1437 BANNOCK
DENVER CO 80208

Executed on September 6, 1983 at Los Angeles, California.

_____

MARK NAGAI

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Roderick W. Leonard, Deputy District Attorney, is a member of the bar of this court. On September 6, 1983, under my supervision, Cecil Patterson, an employee of the office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid and via U. S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543